Local 340, New York New Jersey Regional Joint Board *and* Brooks Brothers, a Division of Retail Brand Alliance, Inc. Case 02–CB–069460

April 13, 2017

DECISION AND ORDER

BY ACTING CHAIRMAN MISCIMARRA AND MEMBERS PEARCE AND MCFERRAN

The General Counsel seeks summary judgment in this case on the grounds that there are no genuine issues of material fact as to the allegations of the complaint, and requests that the National Labor Relations Board find, as a matter of law, that the Respondent, Local 340, New York New Jersey Regional Joint Board (the Union or the Respondent), has violated Section 8(b)(1)(A), (2), and (3) by continuing to seek judicial enforcement of an arbitration award that conflicts with the Board's unit clarification determination.[1] The award requires the Employer, Brooks Brothers, to recognize the Union and apply the collective-bargaining agreement, which includes a union-security clause, to employees at the Employer's 1180 Madison Avenue store, despite the Board's finding in the unit clarification proceeding that those employees were not an accretion to the unit represented by the Union.[2]

The General Counsel issued the complaint on March 31, 2016, and an amendment to the complaint on May 4, 2016. The Union filed an answer admitting the pertinent facts as set forth below, but denying that its conduct violated the Act and asserting affirmative defenses.

On September 15, 2016, the General Counsel filed with the Board a Petition for Summary Judgment and Issuance of Decision and Order, with exhibits, and a memorandum in support of the petition. The General Counsel contends that, in light of the factual admissions contained in the Union's answer, the pleadings raise no genuine issues of fact requiring an evidentiary hearing. On September 27, 2016, the Union filed an opposition to the General Counsel's petition. On September 29, 2016, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the General Counsel's petition should not be granted. Thereafter, on November 3, 2016, the Union filed an Opposition to the Petition for Summary Judgment and Request for Reconsideration of the Board's Denial of Respondent's Request for Review that "supplements and revises" the Union's September 27, 2016 opposition. The Union also filed a supporting memorandum of law. On November 17, 2016, the General Counsel filed a limited response to the Union's opposition.

Ruling on Petition for Summary Judgment

We find that there are no genuine issues of material fact requiring a hearing. We agree with the General Counsel that the complaint allegations denied by the Union raise no issues of fact apart from those already decided by the Regional Director and affirmed by the Board in the underlying unit clarification (UC) case, and that all other complaint allegations were admitted by the Union. We also agree with the General Counsel that none of the Union's affirmative defenses raises any material issue of fact requiring a hearing. For the reasons set forth below, we find that the Union has violated the Act as alleged. Accordingly, we grant the General Counsel's Petition for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, Brooks Brothers, the Employer, has been a Delaware corporation with offices and a principal place of business at 346 Madison Avenue, New York, New York, and has been engaged in the retail sale of clothing at stores throughout the United States. Annually, the Employer, in conducting its business operations, derives gross revenues in excess of $500,000 and has sold and shipped from its 346 Madison Avenue facility products, goods, and materials valued in excess of $5000 directly to points outside the State of New York. We find, on the basis of the foregoing, that at all material times the Employer has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The Union admits, and we find, that at all material times, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Facts

At all material times, the Employer and the Union have maintained a collective-bargaining agreement providing for recognition of the Union as the exclusive

[1] *Brooks Brothers*, Case 02–UC–062745 (September 21, 2015) (not included in bound volumes).

[2] Specifically, the complaint alleges that by pursuing enforcement of the arbitration award, the Union unlawfully insisted on a change in the scope of the unit, thereby refusing to bargain in good faith with the Employer; requested that the Employer apply the terms of the collective-bargaining agreement, including the union-security clause, to non-unit employees, thereby attempting to cause the Employer to discriminate against the 1180 Madison employees in violation of Sec. 8(a)(3) of the Act and to encourage its employees to join the Union; and restrained and coerced employees in the exercise of their Sec. 7 rights.

bargaining agent for unit employees at the Employer's retail stores operated under the name "Brooks Brothers" in New York City and surrounding counties.[3] The recognition clause of the collective-bargaining agreement also contains the following procedures for new retail stores:

> If the Employer opens any new retail store(s) in the above-designated geographic area, the following provisions of this Agreement shall be applicable to such store(s): Articles I, II, III, IV, XI, XIII, XV, XVII, XVIII, XIX, XX, XXI, XXII, XXIII, XXIV, XXV, and XXVI. All other terms and conditions applicable to such store(s) shall be subject to negotiations, on notice to the Union at least 30 days in advance of the store opening, provided that the terms of Article XXV shall not be suspended in connection with such negotiations regardless of whether or not an agreement is reached. This Agreement shall not apply at all to any store(s) opened by the Employer that are identified and operated as factory outlet stores.

The collective-bargaining agreement also contains grievance and arbitration procedures and a union-security clause.

On or about February 26, 2011, the Employer opened the 1180 Madison Avenue store but did not recognize the Union as the collective-bargaining representative of the 1180 Madison employees. The Union did not present any evidence to the Employer that it had majority support from the 1180 Madison employees, but relying on the after-acquired stores clause ("*Kroger* clause") quoted above,[4] the Union, on May 27, 2011, filed a grievance alleging that the Employer violated the collective-bargaining agreement by refusing to recognize the Union as the collective-bargaining representative of the 1180 Madison employees and refusing to apply the contract provisions specified in the recognition clause to them. On August 11, 2011, the Employer filed a UC petition in Case 02–UC–062745, claiming that the 1180 Madison employees were not a proper accretion to the unit. While the UC petition was pending in the Region, an arbitrator issued an award on June 5, 2012, ordering the Employer to recognize the Union as the collective-bargaining representative of the 1180 Madison employees and to apply the collective-bargaining agreement provisions specified in the recognition clause to them. The award, however, was not based on a finding that the Union had obtained the support of a majority of the 1180 Madison employees. The Employer did not comply with the award, and on June 26, 2012, the Union filed a lawsuit in the United States District Court for the Southern District of New York, Case 1:12-CV-05006-ALC, seeking enforcement of the arbitration award. Subsequently, on December 18, 2014, the Regional Director issued a Clarification Decision finding that the 1180 Madison employees were not a proper accretion to the unit. On September 21, 2015, the Board denied the Union's request for review of the Clarification Decision. Despite the Board's denial of review, the Union has continued to maintain the lawsuit seeking enforcement of the conflicting arbitration award.

B. Contentions of the Parties

The General Counsel contends that summary judgment is appropriate because the Union admits that it continued to seek enforcement of the arbitration award ordering that the Employer apply the collective-bargaining agreement, which includes a union-security clause, to the 1180 Madison employees, whom the Board determined, in affirming the Clarification Decision, to be outside the unit.[5] The General Counsel asserts that the complaint allegations denied by the Union, as well as its affirmative defenses, "raise no issues of fact apart from those decided by the Regional Director and affirmed by the Board in the underlying unit clarification case." Those issues cannot be relitigated in a subsequent unfair labor practice proceeding absent newly discovered evidence, previously unavailable evidence, or special circumstances. The General Counsel contends that the Union has shown none of these circumstances; rather, the Union's position is based on its disagreement with the Clarification Decision.

The General Counsel also argues that the Union's attempt to enforce the arbitration award contravenes Board precedent, under which it is unlawful for an employer to recognize a union pursuant to a *Kroger* clause absent a showing of majority support or evidence supporting an accretion. The award here made no finding of majority status but instead relied solely on the language of the *Kroger* clause in ordering that the Employer recognize the Union as the representative of the 1180 Madison employees.

In opposition, the Union argues that the Board should reconsider its denial of the Union's Request for Review in the UC case. The Union asserts that the Region failed to admit certain evidence into the record in that case and that the UC decision departs from established precedent.

[3] The recognition clause provides for recognition at certain named stores and "any other retail store(s) opened during the term of this Agreement."

[4] *Houston Div. of the Kroger Co.*, 219 NLRB 388 (1975).

[5] The Board has held that such conduct violates Sec. 8(b)(1)(A), (2), and (3) of the Act. *Teamsters Local 776 (Rite Aid Corp.)*, 305 NLRB 832, 833–834 (1991), enfd. 973 F.2d 230 (3rd Cir. 1992), cert. denied 507 U.S. 959 (1993).

The Union further asserts that it has lawfully demanded recognition at all material times.

C. Discussion

As pointed out by the General Counsel, the presence of an after-acquired store clause in a collective-bargaining agreement does not automatically result in the inclusion of employees at an after-acquired store in an existing unit. In *Kroger Co.*, supra, 219 NLRB at 388–389, the Board held that where an after-acquired store is not an accretion, proof of majority status by the union is required. See also *Melbet Jewelry Co.*, 180 NLRB 107, 110 (1969) (employees at new store location not found to be an accretion will not be added to an existing unit without some showing that those employees wish to authorize the union to represent them).

In the underlying UC case, the Board denied review of the Regional Director's determination that the 1180 Madison employees were not an accretion to the multi-store unit covered under the collective-bargaining agreement between the Union and Brooks Brothers. The denial of review "constitute[s] an affirmance of the regional director's action which shall also preclude relitigating any such issues in any related subsequent unfair labor practice proceeding." Section 102.67(g) of the Board's Rules and Regulations.[6]

In light of the Board's finding that the 1180 Madison store was not an accretion to the existing multi-store unit, the only lawful basis for including the 1180 Madison employees within the existing unit under the *Kroger* clause would be that a majority of the 1180 Madison employees had authorized the Union to represent them. But here, the Union presented no such evidence and the arbitrator made no such finding.[7] Because there is no lawful basis for including the 1180 Madison employees in the existing unit under the *Kroger* clause, we find that the arbitration award, which requires the Employer to recognize the Union and apply the terms of the collective-bargaining agreement to the nonunit 1180 Madison employees in the absence of either an accretion or a showing of majority status, contravenes both Board precedent and the Board's affirmance of the Clarification Decision finding no accretion.

Our decision is supported by *Teamsters Local 776 (Rite Aid Corp.)*, supra, 305 NLRB at 833–834, in which the Board found that the union violated Section 8(b)(1)(A), (2), and (3) of the Act by continuing to maintain a lawsuit to enforce an arbitrator's award that was contrary to a unit clarification determination excluding the employees at issue from the unit. Citing *Carey v. Westinghouse Electric Corp.*, 375 U.S. 261, 272 (1964), the Board held that the arbitrator's decision was not controlling because it was superseded by the superior author-

[6] Despite the finality of the Board's denial of review, the Union has now requested reconsideration of the Board's no-accretion finding. Renewing arguments made in its Request for Review, the Union asserts that the UC decision departed from Board precedent. We deny the Union's request for reconsideration. Issues that were or could have been litigated in a prior representation proceeding cannot be relitigated in a subsequent unfair labor practice proceeding absent newly discovered evidence, previously unavailable evidence, or special circumstances. *Warren Unilube, Inc*., 357 NLRB 44, 44 (2011), enfd. 690 F.3d 969 (8th Cir. 2012); *Allied Trades Council (Duane Reade, Inc.)*, 342 NLRB 1010, 1012–1013 (2004) (union precluded in a subsequent unfair labor practice proceeding from relitigating the scope of the bargaining unit by raising for the first time the issue of accretion, an issue that could have been raised in the representation proceeding); *American Tempering, Inc.*, 296 NLRB 699 (1989) (adopting ALJ's reliance, in an unfair labor practice case, on the "no accretion" finding in a prior unit clarification decision, affirmed by the Board on review, in light of parties' failure to identify any new evidence in regard to the accretion issue), enfd. 919 F.2d 731 (3d Cir. 1990). In the instant case, the Union has offered no new or previously unavailable evidence that would change the result in the UC case.

Nor does the Union's claim that the Region failed to enter certain exhibits into the record in the UC case constitute special circumstances warranting reconsideration of the no-accretion finding. The Union asserts that the Region failed to enter 21 exhibits (Exhs. 40–60) into the record of the UC case, notwithstanding the hearing officer's Order dated October 25, 2013, that the exhibits be entered in the record after the hearing was adjourned. The Union contends that in light of that alleged failure, the Regional Director and the Board did not have access to the exhibits at the time the UC case was considered. We reject this argument because there is no merit to the Union's claim that the exhibits were not entered into the record. Although the Union was informed by the Board's FOIA Office that the exhibits were "not located" in the agency's electronic case file, the General Counsel argues, and we find, that that information was erroneous, likely resulting from the mislabeling of the exhibits. Our review of the electronic case file shows that the exhibits were added to it on October 31, 2013, and therefore, contrary to the Union's assertion, they were available to the Regional Director and the Board to review, if necessary, during the consideration of the UC case. In these circumstances, we find no special circumstances warranting reconsideration of the UC case.

[7] Although the Union does not claim that it had majority status in 2011 and 2012 when it initiated the arbitration proceeding at issue here, it claims that it has been seeking recognition based on majority status since April 2, 2015, prior to the Board's denial of review in the UC case. It further asserts that it filed a grievance and demand for arbitration on September 24, 2015, seeking to have the arbitrator verify whether the Union can establish majority support. It argues that because it now has a lawful basis to demand recognition from the Employer, its efforts to enforce the June 5, 2012 arbitration award are not unlawful. We find that the Union's claim of current majority support does not raise a genuine issue of material fact warranting denial of summary judgment in this case. The 2012 arbitration decision at issue in the Union's enforcement action was not based on the arbitrator's verification of the Union's alleged majority support, and the Union does not claim that it had majority support at that time. Because the Union's asserted showing of majority support among the 1180 Madison employees in 2015 does not form the basis of the arbitration award that the Union is seeking to enforce, it is irrelevant to the Union's enforcement proceeding. We find, therefore, that the Union's claim that it had majority status as of April 2, 2015, does not require a denial of summary judgment.

ity of the Board's subsequent unit clarification decision. The Board found that by continuing the lawsuit to enforce the arbitrator's conflicting award, the union was, in effect, seeking to apply the collective-bargaining agreement to employees whom the Board had determined to be outside of the bargaining unit, and by doing so, the union was insisting on a change in the scope of the existing bargaining unit in violation of Section 8(b)(3) of the Act. The Board also held that insisting on application of a collective-bargaining agreement including a union-security clause to employees who are unrepresented violates both Section 8(b)(1)(A) and Section 8(b)(2). *Rite Aid*, 305 NLRB at 834.[8]

Here, for the reasons set forth above, the Union is not the lawful collective-bargaining representative of the 1180 Madison employees. We find, therefore, that by maintaining the lawsuit seeking enforcement of the arbitration award after the Board's denial of review in the UC case holding that the 1180 Madison store was not an accretion to the existing multi-store unit, and in the absence of the required showing of majority status, the Union has in effect sought a court order requiring the Employer to apply the collective-bargaining agreement, which includes a union-security clause, to employees outside of the bargaining unit. We conclude, as in *Rite Aid*, that this conduct violated Section 8(b)(1)(A), (2), and (3) of the Act.[9]

CONCLUSIONS OF LAW

1. The Employer is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By continuing to seek enforcement of an arbitration award that is incompatible with the Board's unit clarification decision in Case 02–UC–062745 and requires the Employer to apply its collective-bargaining agreement to employees outside the bargaining unit, the Respondent has insisted and is insisting on bargaining for a change in the scope of the existing bargaining unit and has thereby refused to bargain in good faith with the Employer in violation of Section 8(b)(3) of the Act.

4. By pursuing enforcement of the June 5, 2012 arbitration award, thereby insisting on application of certain contract provisions, including the union-security clause, to the Employer's nonunit 1180 Madison employees, the Respondent has restrained and coerced employees in violation of Section 8(b)(1)(A) of the Act and has attempted to cause the Employer to discriminate against its employees in violation of Section 8(a)(3) of the Act, in violation of Section 8(b)(2) of the Act.

5. The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in unfair labor practices within the meaning of Section 8(b)(1)(A), (2), and (3) of the Act, we shall order that it cease and desist and take certain affirmative action designed to effectuate the policies of the Act. We shall order the Respondent to withdraw or if necessary otherwise seek dismissal of the lawsuit in the United States District Court for the Southern District of New York, Case 1:12-CV-05006-ALC, seeking enforcement of the June 5, 2012 arbitration award, and to reimburse the Employer for all reasonable expenses and legal fees, with interest, that the Employer incurred after September 21, 2015—the date of issuance of the Board's unit clarification order—in defending against the lawsuit. Interest shall be computed as prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

ORDER

The National Labor Relations Board orders that the Respondent, Local 340, New York New Jersey Regional Joint Board, New York, New York, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Maintaining its lawsuit seeking enforcement of Arbitrator Daniel F. Brent's June 5, 2012 Award, which is incompatible with the Board's unit clarification decision in Case 02–UC–062745 and requires the Employer to apply the collective-bargaining agreement, which includes a union-security clause, to employees outside the bargaining unit.

(b) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Withdraw or if necessary otherwise seek dismissal of any action in Case 1:12-CV-05006-ALC in the Unit-

[8] In *Rite Aid*, the Board found that maintaining a lawsuit aimed at achieving a result that is incompatible with a contrary Board ruling fell within the "illegal objective" exception articulated in fn. 5 of *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731 (1983), and therefore lacked constitutional protection. 305 NLRB 834–835. See also *Allied Trades Council (Duane Reade, Inc.)*, supra, 342 NLRB at 1013 fn. 4.

[9] Because the General Counsel attacks the maintenance of the lawsuit only after September 21, 2015, when the Board ruled on the Union's request for review in the UC case, we need not decide whether the filing and maintenance of the lawsuit prior to that point constituted an unfair labor practice.

ed States District Court for the Southern District of New York.

(b) Reimburse the Employer, Brooks Brothers, for all reasonable expenses and legal fees incurred since September 21, 2015, in defense of Case 1:12-CV-05006-ALC in the United States District Court for the Southern District of New York, with interest as set forth in the remedy section of this decision.

(c) Within 14 days after service by the Region, post at its offices and meeting halls and all other places where notices to its members are customarily posted, copies of the attached notice marked ''Appendix.''[10] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to members are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its members by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Within 14 days after service by the Region, deliver to the Regional Director for Region 2 signed copies of the notice in sufficient number for posting by the Employer at its 1180 Madison Avenue facility, if it wishes, in all places where notices to employees are customarily posted.

(e) Within 21 days after service by the Region, file with the Regional Director for Region 2 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. April 13, 2017

Philip A. Miscimarra, Acting Chairman

Mark Gaston Pearce, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[10] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES AND MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain on your behalf with your employer

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT continue to maintain our lawsuit seeking enforcement of Arbitrator Daniel F. Brent's June 5, 2012 Award, which is incompatible with the Board's unit clarification decision in Case 02–UC–062745 and requires the Employer to apply the collective-bargaining agreement, which includes a union-security clause, to employees outside the bargaining unit.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights listed above.

WE WILL withdraw or if necessary otherwise seek dismissal of any action in Case 1:12-CV-05006-ALC in the United States District Court for the Southern District of New York.

WE WILL reimburse the Employer, Brooks Brothers, for all reasonable expenses and legal fees, with interest, incurred since September 21, 2015, in defense of Case 1:12-CV-05006-ALC in the United States District Court for the Southern District of New York.

LOCAL 340, NEW YORK NEW JERSEY REGIONAL JOINT BOARD

The Board's decision can be found at www.nlrb.gov/case/02–CB–069460 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor

Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.